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No. 86-439

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

IN RE: CENTURY BRASS PRODUCTS, INC.,
Debtor,

CENTURY BRASS PRODUCTS, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

If an employer and a union are parties to a collective bargaining agreement that provides benefits to retired employees, and modifications in those benefits are necessary to permit the employer to reorganize under Chapter 11 of the Bankruptcy Code, is a proposal containing such modifications made to the union a proposal to the "authorized representative of employes covered by such agreement" within the meaning of 11 U.S.C. § 1113?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were:

Plaintiff-Appellee: Century Brass Products, Inc.*

Defendants-Appellants: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1604.

Party-in-interest: The Century Brass Products, Inc., Official Committee of Unsecured Creditors participated below as a party-in-interest in support of Century Brass Products, Inc.

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* Century Brass Products, Inc. has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

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Respondent, The Century Brass Products, Inc. Official Committee of Unsecured Creditors ("Creditors' Committee"), which participated in the proceedings below as a party-in-interest, respectfully prays that the Petition For a Writ of Certiorari filed by Century Brass Products, Inc. ("Century") in this case be granted. The Creditors' Committee hereby adopts the Statement of the Case as presented by Century in its Petition.

ARGUMENT

I. THE DECISION BELOW WILL FRUSTRATE THE IMPORTANT OBJECTIVES SERVED BY SECTION 1113.

The potential success of many reorganizations under Chapter 11 of the Bankruptcy Code depends upon the ability of the debtor to modify or reject a collective bargaining agreement which is burdensome to the estate. Following this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) permitting rejection in certain circumstances and the controversy over the decision, Congress enacted Section 1113 of the Code, 11 U.S.C. § 1113, which establishes a comprehensive procedural and substantive scheme to deal with the issues surrounding the rejection of collective bargaining agreements. One of the most important features of this scheme is the requirement that the parties to the agreement — the union and the debtor — engage in a form of expedited bargaining over contract modifications proposed by the debtor. According to the terms of this provision, this process starts when the debtor makes a proposal to modify the agreement to the "authorized representative of the employees covered by the agreement." As the Bankruptcy Court and the District Court each held, and as clearly indicated by the legislative history underlying the enactment of this section, the "authorized representative" is the union which entered into the agreement. The Second Circuit's decision, however, has fundamentally altered the straightforward and expeditious process envisioned by Section 1113. According to the court, since Century's proposal sought a reduction in benefits for both active and retired employees, a conflict of interest was created which precluded the UAW from representing the retirees. Because of Century's failure to have negotiated with a retirees' representative appointed by the bankruptcy judge, the Second Circuit held that Century had violated the requirements of Section 1113.

As explained in Century's Petition and as explained below, the decision below merits review by this Court. Though the Second Circuit's opinion suggests that separate retiree representation will be the exception rather than the rule, in actuality, since virtually all Section 1113 proposals must seek reductions in retiree benefits, separate representation will be required under the court's rationale in virtually all Section 1113 proceedings. By departing from the language of the statute, the Second Circuit has thus transformed an expeditious and relatively simple process into a complicated, time-consuming and unworkable system involving bargaining between three parties instead of two. The numerous practical and legal problems created by this new Section 1113 procedure, many of which are discussed at pages 10–11 of Century's petition, will serve as a serious disincentive to the willingness of many creditors to permit a reorganization. Indeed, the decision below, which will necessitate protracted and costly future proceedings in this case in order to resolve these issues and to reach a final resolution of the status of the collective bargaining agreement, has and will continue to jeopardize the possible success of this reorganization.

As explained in Century's Petition, the decision below is inconsistent with the terms of Section 1113 and is demonstrably at odds with Congress' intent in its enactment. Moreover, the negotiating process mandated by the decision will be cumbersome and often confused and will create a host of procedural and substantive issues which will take years of litigation to resolve. Ultimately, the Second Circuit's approach will undoubtedly lead to more rejected contracts than negotiated modifications and to more liquidations than reorganizations. This result, which is so obviously in conflict with Congress' objectives in enacting Section 1113, should not be left to stand.

The Creditors' Committee joins in all of the arguments offered by Century in support of its Petition. It is respectfully requested that for those reasons and the reasons discussed below, Century's Petition should be granted.

II. THE DECISION BELOW IS INCONSISTENT WITH SECTION 1113.

Before a debtor may reject a collective bargaining agreement in a Chapter 11 proceeding, the procedural and substantive requirements of Section 1113 must be satisfied. A debtor seeking to modify such an agreement must first "make a proposal to the authorized representative of the employees covered by such agreement" which satisfies the standards articulated in 11 U.S.C. § 1113(b)(1)(A). The Second Circuit's conclusion that Century's proposal to the UAW violated Section 1113 because of a conflict between the union and its retirees and that, consequently, a proposal should also have been made to a separate retirees' representative, is flatly inconsistent with the language of the statute and its legislative intent.

As noted by Century in its Petition, the language of Section 1113 is clear and unambiguous—the debtor is required to "make a proposal to *the* authorized representative of the employees . . ." (emphasis added). The Second Circuit's holding that Century was required to make a proposal to more than one representative simply cannot be squared with the plain language of the act. Moreover, as explained at pages 12-13 of Century's Petition, the legislative history underlying the enactment of Section 1113 demonstrates that Congress intended the terms "authorized representative" and "union" to have the same meaning.

Indeed, if Congress had intended to preclude unions from representing retirees in Section 1113 proceedings—which is indisputably the result of the Second Circuit's decision given the inclusion of retirement benefits in virtually all collective bargaining agreements—Congress would surely have used the term "exclusive representative" rather than "authorized representative" in Section 1113. The term "exclusive" representative is found in Section 9(a) of the National Labor Relations Act (NLRA) which provides that "representatives designated or selected . . . shall be the exclusive representatives of all the employees in such unit." As this Court held in

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 160 (1971), since retirees are not bargaining unit employees under the NLRA, the union cannot be their "exclusive" representative. Therefore, had Congress used this NLRA term in Section 1113, the UAW's position that it could not function as the retirees' representative in a Section 1113 proceeding because it was not their "exclusive" representative might have had some merit.

Instead, however, in enacting Section 1113, Congress required the debtor to negotiate the terms of a proposed contract modification with the "authorized representative" of those whose benefits are covered by the contract. There can be no dispute that a union acts as an "authorized representative" of retired employees covered by the agreement. Indeed, these retirees are members of the union which negotiated the collective bargaining agreement on their behalf. Moreover, unions typically represent retirees and active employees in other contexts as well. For example, in this very proceeding the union represented retirees on the Creditors' Committee notwithstanding its representation of active employees.

By using the term "authorized representative" rather than "exclusive representative" Congress surely intended to require that the signatory to a collective bargaining agreement represent the interests of all whose benefits are covered by the agreement and not just those who are part of the certified bargaining unit. By requiring a debtor to negotiate with both the union and a retirees' representative, the Second Circuit has not only departed "somewhat from a literal reading of § 1113" as conceded in its opinion, it has, in effect, rewritten this key provision of the statute. Congress intended Section 1113 to provide a straightforward and swift process for dealing with modifications and terminations of collective bargaining agreements in a Chapter 11 reorganization. The Second Circuit's revision of Section 1113, as discussed above and as more fully explained in Century's Petition, frustrates Congressional intent by creating a procedural nightmare. The time and expense involved in complying with the new

procedures necessitated by the Second Circuit's decision, and the litigation necessary to resolve the host of practical questions raised by its approach to Section 1113, make it far less likely that the creditors in this proceeding as well as creditors in Chapter 11 proceedings generally will attempt reorganization instead of liquidation.

III. NO CONFLICT OF INTEREST PREVENTS UNION REPRESENTATION OF RETIREES IN A SECTION 1113 PROCEEDING.

As explained above, there is no question that when a union negotiates a collective bargaining agreement which provides for retirement benefits, the union is an "authorized representative" under Section 1113 of both the active and retired employees. The Second Circuit's decision is not to the contrary. Indeed, the Second Circuit's opinion seems to envision union representation of retirees in the vast majority of Section 1113 proceedings. However, alluding to *Pittsburgh Plate Glass*, the court refused to adopt a *per se* rule permitting union representation of retirees in all Section 1113 proceedings finding that "it may not always be appropriate for a union to represent both active and retired workers in modification negotiations." (App. A at 21a). The court proceeded to find that a conflict of interest prevented the UAW from representing both the interests of active workers, who seek to decrease the financial burden of retirees' benefits and the interests of retirees, who seek to protect their benefits from reduction.

The Second Circuit's conclusion that the divergence of interests between active and retired employees prevents union representation of both groups constitutes a significant departure from established principles. As noted by the Second Circuit, it is true that this Court recognized in *Pittsburgh Plate Glass* that even in the normal collective bargaining context, the interests of the two groups were potentially divergent. Nonetheless, this Court specifically noted in that decision that despite this possible conflict of interest, nothing precluded

union representation of both groups during collective bargaining. 404 U.S. at 181, n.20. According to the Court, when a union represents "retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents . . ." 404 U.S. at 173, n.12. The Second Circuit's reliance upon *Pittsburgh Plate Glass* for the proposition that a "conflict exists as a matter of law" (App. A at 23a) when a union undertakes to represent the divergent interests of both active and retired employees is, therefore, entirely misplaced.

The Second Circuit's decision finding a conflict of interest as a matter of law is not only inconsistent with *Pittsburgh Plate Glass*, it also casts doubt upon the legality of the practice of unions throughout the country of representing both groups in a variety of contexts including other bankruptcy proceedings. Indeed, there have by now been numerous proceedings conducted pursuant to Section 1113, many of which are still pending, which logically must have involved proposals to modify the benefits of both retirees and active employees. Unions throughout the country have, presumably, been acting as the "authorized representative" of both groups without objection. In fact, the agreement reached under Section 1113 between the United Steel Workers and the debtor in *Wheeling-Pittsburgh Steel Corp. v. United Steel Workers of America*, 791 F.2d 1074 (3rd Cir. 1986) involved, *inter alia*, retirees' benefits, 791 F.2d at 1078. As far as we are aware, no "retiree representative" has ever been requested or appointed in any Section 1113 proceeding. If the Second Circuit's decision is not reversed, every such Section 1113 proceeding presumably may be subject to attack on conflict of interest grounds.

In addition, and as pointed out repeatedly in this case, the UAW, as is the general practice in bankruptcy proceedings, has represented the interests of retired employees on the Creditors' Committee even as it represented the interests of active employees in other contexts such as the Section 1113 process. Despite the fact that the interests of retirees as creditors of Century and the interests of active employees are potentially divergent, the UAW has never suggested that a

conflict of interest prevented it from representing both groups. Yet the rationale of the decision below would seem to prevent a union from representing retirees in such a context. The decision below merits review by this Court, therefore, not only because it is completely at odds with Congress' intent in enacting Section 1113 but also because it calls into question the propriety of Section 1113 proceedings pending throughout the country as well as the traditional union role of representing active and retired employees in other contexts where their interests may also be divergent.

In addition, though the Second Circuit's opinion envisions union representation of both active and retired employees as the general rule in Section 1113 proceedings, it is difficult to conceive of a situation in which a conflict would not be found under the court's rationale. As pointed out in Century's petition at page 9, virtually all collective bargaining agreements provide for retirement benefits. Section 1113 requires that a debtor make a proposal to modify benefits which treats all affected parties fairly and equitably. A debtor's proposal will, therefore, ordinarily provide for a modification of retirement benefits together with the benefits of all other affected parties. It would seem under the court's analysis that a conflict of interest would always prevent a union from representing both active employees and retirees in this situation. Since this result is completely at odds with the Second Circuit's indication that such representation will be appropriate as a general rule, the decision below may be expected to create extensive confusion and uncertainty among unions, Chapter 11 debtors and the lower courts as to when a conflict of interest exists. Further review by this Court would clarify whether the Second Circuit was correct in finding a conflict of interest in this Section 1113 proceeding and, if so, what the standards are in making this determination.

Finally, even if the Second Circuit were correct in finding a conflict of interest, its conclusion that it was the debtor's burden to take the appropriate steps to avoid the conflict is entirely unfair and illogical. Both active and retired employees

are, after all, members of the union. It is the union's primary duty to protect the interests of all of its members and not that of the employer. If the UAW felt that in this Section 1113 proceeding a conflict prevented it from representing both groups, the UAW should have sought court appointment of a retirees' representative at the commencement of the proceedings. The UAW, of course, never took such a step. Indeed, the union has maintained throughout these proceedings that the retiree benefits in question were not even subject to the Section 1113 proceeding. This position was based on the UAW's argument that the retiree benefits were vested, lifetime benefits and, therefore, could not be reduced without the individual consent of each retiree under the principles of *Pittsburgh Plate Glass*. Given the UAW's failure to have sought the appointment of a retiree representative and its position that retiree benefits were not even subject to Section 1113 negotiations, the Second Circuit's conclusion that Century failed to meet its "threshold burden of negotiating with a representative of the company's retired employees" (App. A at 23a) is entirely mystifying.

It is respectfully submitted that since it is the union's obligation to protect the interests of all of its members, it ought to be the union's burden to determine whether a potential conflict exists and if so to seek separate representation to avoid the conflict. The Second Circuit's opinion offers no justification whatsoever for placing this burden on the employer. Therefore, even if the court below is correct that a conflict of interest existed here, the decision nonetheless merits further review in order to clarify the "threshold burdens" imposed by Section 1113.

CONCLUSION

For all of the foregoing reasons and those stated by Century Brass in its Petition, the Creditors' Committee respectfully suggests that the important questions presented by this case warrant this Court's consideration. Therefore, the Creditors' Committee supports the petitioner's request that its petition for certiorari be granted.

Respectfully submitted,

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